REPORTER'S NOTES

REPORTER'S NOTES TO RULE 14 (d)

The definition of a statement was revised in 2008 to exempt the means by which hearing impaired attorneys gain access to an electronic display of the words a witness utters. Whether through a computer assisted real time translation or other means, so long as the witness' words are not transcribed or saved in electronic form, as in a computer file, the fact that a contemporaneous transcript of the witness' words appears on a screen to assist a hearing impaired attorney does not fit the definition of a statement under the terms of Rule 14. This amendment does not affect any other aspect of an attorney's discovery obligations, such as the requirement that a prosecutor reveal exculpatory evidence.

REPORTER'S NOTES TO RULE 28 (e)

This section was added to meet the concerns the Supreme Judicial Court expressed in its opinion in Commonwealth v. Simmons, 448 Mass. 68 (2007). It addresses the procedure for placing a case on file without a sentence after a guilty verdict, a guilty finding or a plea of guilty. Before a court can place a complaint or indictment on file, both the defendant and the Commonwealth must consent. The defendant's consent is necessary because the suspension of the case deprives the defendant of the right to be sentenced in a timely fashion and the right to appeal. *See Simmons*, 448 Mass. at 698; Commonwealth v. Delgado, 367 Mass. 432, 438 (1975); Marks v. Wentworth, 199 Mass. 44, 45 (1908). The defendant's consent must be in writing and made part of the record in the case.

The Commonwealth's consent is necessary both because it accords with the historical practice, *see* Commonwealth v. Dowdican's Bail, 115 Mass. 133, 136 (1874) ("It has long been a common practice in this Commonwealth . . . to order, with the consent of the defendant *and of the attorney for the Commonwealth*, and upon such terms as the court in its discretion may impose, that the indictment be laid on file . . . .") (emphasis added), and because of the general public interest in seeing the timely imposition of a sentence.

If the judge does not otherwise specify, a filed case remains inactive indefinitely. The judge may, however, provide for the time frame within which the case may be brought forward as well as the occurrence of any events that would serve as the predicate for removing the case from the file. *See, e.g.*, Commonwealth v. Marinucci Bros. & Co., 354 Mass. 743, 745 (1968) (defendant paying restitution); Commonwealth v. Pelletier, 62 Mass. App. Ct. 145, 146-147 (2004) (defendant serving a specified term in prison before being paroled). Since both the

Commonwealth and the defendant have a right to have the judge impose a sentence, by implication if the judge sets a time limit or establishes a contingency that would bring the case forward, both parties must agree.

The notice the defendant must receive about the implications of filing a case without imposing sentence is similar to a guilty plea colloquy in that it must occur in open court on the record. It is, however, not as detailed as a guilty plea colloquy nor must the judge specifically address the question of voluntariness, as would be the case with a guilty plea. *Cf.* Rule 12(a)(5). The defendant must, however, file with the court a signed statement agreeing to the filing of the case without a sentence and acknowledging the time frame within which the case can be removed from the file as well as the occurrence of any events that would serve as the predicate for its removal.

Subsection (i) requires the court to inform the defendant that he or she has the right to request that a case be removed from the file at any time. This reflects the historical practice surrounding the filing procedure, *see* Commonwealth v. Chase, Thacher's Crim. Cas. 267, 268-269 (Boston Mun. Ct. 1831) *quoted in* Commonwealth v. Simmons, 448 Mass. 687, 696 (2007) ("the [defendant] might at any time [appear] in court, and [demand] the judgment of law."); Commonwealth v. Dowdican's Bail, 115 Mass. 133, 136 (1874) ("[the practice of filing] leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward"). Since a defendant ordinarily cannot obtain appellate review of a filed case, *see* Commonwealth v. Delgado, 367 Mass. 432, 438 (1975), allowing the defendant to remove a case from the file is the only way to effectuate the right to appeal.

Subsection (ii) requires the defendant to receive notice of the reasons why the case can be removed from the file. One contingency that must be part of the notice in every case is the possibility that a related conviction was reversed or a related sentence vacated or modified. In the usual instance, a related conviction will be one that was joined for trial with the complaint or indictment that is being filed. *See, e.g.*, Commonwealth v. Owens, 414 Mass. 595, 596 (1993). In some circumstances, however, a conviction that results from a separate proceeding may be based on the same course of criminal conduct as the filed case. In that situation, if the conviction or sentence in the separate case were reversed or vacated, the filed case could be brought forward.

Another element of the notice the defendant must receive under subsection (ii) is that the case may be removed from the file if the defendant commits a new criminal offense. The Supreme Judicial Court has recognized that historically, an implicit condition of a case remaining on file was the defendant's good behavior. *See* Commonwealth v. Simmons, 448 Mass. 687, 697 (2007). In *Simmons* itself, the Court approved the removal of an indictment from the file because the defendant was charged with a new offense. "Future criminal conduct" rather than "good behavior" is a more appropriate standard to incorporate into contemporary procedure given the existence of probation and the need to provide fair notice to the defendant of the reasons why a case might be brought forward for sentencing. If a defendant's future behavior has to be monitored on a long-term basis beyond the specific criterion of avoiding future criminal conduct, probation is a more appropriate vehicle than placing a case on file. The notice also informs the

defendant that the issue of future criminal behavior is one that the prosecutor must establish by a preponderance of the evidence in order to justify removing a case from the file and having the court impose a sentence. The preponderance standard is the one that governs a probation revocation hearing, which is the closest analogy to removing a case from the file. *See* Commonwealth v. Holmgren, 421 Mass. 224, 226 (1995). It is also the standard that a judge must apply in sentencing. *See* Nichols v. United States, 511 U.S. 738, 748 (1994); Commonwealth v. Nawn, Jr., 394 Mass. 1, 7 (1985).

Subsection (ii) also recognizes that in an individual case a judge may make bringing the case forward contingent upon a specific event, such as the defendant paying restitution, *see e.g.* Commonwealth v. Marinucci Bros. & Co., 354 Mass. 743, 745 (1968), or serving a specified term in prison before being paroled, *see e.g.* Commonwealth v. Pelletier, 62 Mass. App. Ct. 145, 146-147 (2004). The defendant must receive explicit notice of any such contingency.

Subsection (iii) requires the court to inform the defendant that if the case is removed from the file, the defendant can receive a sentence that entails additional punishment. *Cf. Simmons*, 448 Mass. at 695 n.9. This provision does not require the type of colloquy concerning the details of a maximum sentence that must accompany a guilty plea. *Cf.* Rule 12(c)(3)(B). The defendant must, however, be made aware of the possibility of additional punishment and the judge should tailor the amount of information on this topic to the needs of each specific case.

The last provision in this section addresses the power of a judge to impose a sentence after a case is removed from the file. The Supreme Judicial Court has made clear that when a case is brought forward from the file, the judge, in deciding on what sentence to impose, must conform the new sentence to "the over-all scheme of punishment employed by the trial judge." *Simmons*, 448 Mass. at 699. This requirement means the sentencing judge has to take into account two limitations. One is the length of the original sentencing scheme. In *Simmons*, for example, the Court determined that the disparity between the two sentences was too great where a defendant was originally sentenced to concurrent terms of eight to twelve years on six armed robbery indictments and five years later received a sentence of eighteen to twenty years on a single count of armed assault with intent to rob that had been removed from the file. *See id.* at 699. It may be appropriate in some cases for the judge who orders a case placed on file to indicate what type of sentence is contemplated if the case is ever removed from the file. The other limitation stems from the requirement of due process that a defendant not be punished for conduct other than that for which he or she was convicted. *See* Commonwealth v. Bianco, 390 Mass. 254, 259 (1983). Since an allegation of new criminal conduct will often be the occasion for bringing a case out of the file, the judge should take care not to impose a harsher sentence on the filed case because the defendant "has not demonstrated his innocence of [the] unrelated, pending charge." Commonwealth v. LeBlanc, 370 Mass. 217 (1976).